Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

ROBERT M. SCHARRINGHAUSEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Ninth Circuit's ruling is in direct conflict with this Court's decisions in *United States v. Gaudin*, 515 U.S. 506 (1995), *Sandstrom v. Montana*, 442 U.S. 510 (1979) and *In Re Winship*, 397 U.S. 358 (1970) and deprived Petitioner due process of law by allowing convictions to stand where the jury instructions omitted one of the key essential element of the offense – intent to defraud?

PARTIES TO THE PROCEEDING

There are no other parties in this matter.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Robert M. Scharringhausen, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on October 7, 1999.

I.

OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals affirmed Mr. Scharringhausen's convictions for bankruptcy fraud, Title 18 U.S.C. § 152. A copy of the Memorandum Opinion is included in Appendix "A".

II.

JURISDICTION

The Ninth Circuit entered judgment on October 7, 1999 wherein it affirmed Petitioner's convictions after a jury trial for bankruptcy fraud under Title 18 U.S.C. § 152. On December 22, 1999 the Ninth Circuit denied a petition for rehearing and suggestion for rehearing *en banc*. Jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1).

III.

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

United States Constitution, Amendment V provides:

"[N]or shall any person be . . . deprived of life, liberty or property without due process of law."

United States Constitution, Amendment VI provides:

"[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."

IV.

STATEMENT OF THE CASE

A. Summary Of The Facts

After a long investigation by the federal government into an alleged investment fraud scheme[1], a facially elaborate indictment was returned by the U.S. Attorney's office in the Southern District of California against Petitioner. The indictment charged Petitioner with a scheme to defraud investors, money laundering of the alleged defrauded investments, and, the charges at bar, filing false bankruptcy applications **as a cover-up**, ostensibly **to hide** the alleged scheme to defraud and the ill-gotten assets.

After a two-week jury trial, Petitioner was acquitted of all the predicate fraud counts, all the money-laundering counts and one of the bankruptcy fraud counts. The acquittals cannot be said to have resulted from jury nullification as even the district court noted – "But I can tell the government I don't think that you've proved – I don't think that you've proved at all that there was anything

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[1] The criminal investigation was instigated by disgruntled investors and their lawyer. They were also assisted by one of the bankruptcy court trustees assigned to this case who, surprisingly, was also represented by the same lawyer who represented the disgruntled investors.

wrong about the initial solicitation of funds" (the alleged basis for the mail fraud). [R.T. Vol. VI-12] The trial court added – "I don't think you've shown money laundering, **and I have serious reservations about the bankruptcy fraud . . . .**" [R.T. Vol. VI-13] (emphasis added).

The jury convicted Petitioner on three of the bankruptcy fraud charges (acquitted on Count 11) despite the government's argument, and attempted proof at trial, that the bankruptcy petitions were a cover-up for the very scheme to defraud *a fortiori* found to have been nonexistent by the jury **and** by the district court. These convictions can be said to have been made possible, despite evidence to the contrary, by what the Ninth Circuit here described as "a defect in the jury instructions." See, Appendix "A" at page 4.

B. The Decision By The Court Of Appeals

On October 7, 1999 the Ninth Circuit filed its decision affirming Petitioner's bankruptcy fraud convictions obtained under Title 18 U.S.C. § 152. In its Memorandum Opinion, reproduced herein as Appendix "A", the court stated:

> [Petitioner] argues that his case is controlled by *United States v. McCormick*[2] [footnote omitted]. Under *McCormick*, one element of bankruptcy fraud is that "the statement was knowingly **and fraudulently** made." [footnote omitted] There

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[2] 72 F.3d 1404 (9th Cir. 1995).

> has to be **"specific intent to fraudulently conceal assets from the bankruptcy trustee."** [citation to *McCormick* omitted]

Appendix at page 2 (emphasis added). Elsewhere in its opinion, the Ninth Circuit stated:

> [T]he district judge made a finding of fact that **"there wasn't an intent by [Petitioner] to hide [his financial] transactions from the [bankruptcy court] trustee**. The government argues that this finding cannot be squared with the guilty verdict. But it can, because of an (unobjected to [sic]) **defect in the jury instructions. The instructions did not tell the jury that the statements had to be knowingly and fraudulently made**, just that Scharringhausen had to know that the statements were false. So what the jury concluded to have been proved beyond a reasonable doubt **did not necessarily include an intent to hide the transactions from the trustee**.

Appendix at page 4 (emphasis added). Clearly, the Ninth Circuit determined that the essential element required by *McCormick*, its own precedent – intent to hide transactions from the bankruptcy trustee – was not met in this case. However, that issue of constitutional dimensions was apparently lost on the Ninth Circuit, because it inexplicably upheld the obviously tainted convictions without ever noting the due process problem nor getting to the issue of prejudice.

Despite recognizing that the "instructions did not tell the jury that the statements had to be knowingly and fraudulently made," the Ninth Circuit illogically hypothesized:

> [T]he jury here **could conclude** from the evidence that Scharringhausen knew how he was conducting his partnerships' [sic] affairs and controlled how the papers were prepared so that he could hide his transactions. **Perhaps** a careful trustee **might** have found what Scharringhausen failed to disclose, by examining the hundreds of boxes of papers that he produced. That does not, however, establish that no reasonable juror **could think** that he was trying to hide what he did not disclose on the form. Jurors **could think** that he did not realize that the contents of the boxes would trip him up, or that he believed that probably no one would do all the work and have all the luck necessary to catch him by poring over the papers in the boxes. Jurors **could infer intent to defraud** from [a government witness's] testimony that Scharringhausen told her not to disclose certain accounts and money that he had taken from the firms.

Appendix at page 3 (emphasis added). All of these assumptions ventured by the Ninth Circuit were directly contrary to the district court's finding of fact previously quoted. The Ninth Circuit made no attempt to consider this obvious contradiction between its factual ruminations and the findings by the trial court. This, despite noting at page 4 of its opinion that – "We must give 'due regard' to the district court's judgment of witnesses' credibility, we must **accept findings of fact unless they are clearly erroneous**,. . . . " (emphasis added) Unfortunately, the Ninth Circuit failed to heed its own correct observation – "The district judge was there, saw the witnesses, **had doubts about the foundation for the testimony of the government's lead witness**, Strauss, and was cognizant of the strength of the evidence and the acquittals on

the other counts as well as convictions on these three counts" (emphasis added). The district court found that Petitioner did not have intent to deceive or defraud the bankruptcy trustee.

The Ninth Circuit's opinion never articulated its internal logical inconsistency. Nor did it ever grasp the obvious due process problem with a jury instruction, having noted its own precedent on point in *McCormick*, which relieved the government's burden of proving every element of the offense beyond a reasonable doubt.

V.

REASON FOR GRANTING THE WRIT

(Rules 10(c))

This writ should be granted because the Ninth Circuit's ruling has deprived Petitioner due process of law by violating this Court's well-established precedent in *United States v. Gaudin*, 515 U.S. 506 (1995), *Sandstrom v. Montana*, 442 U.S. 510 (1979) and *In Re Winship*, 397 U.S. 358 (1970) and by allowing bankruptcy fraud convictions to stand without the constitutionally required proof, beyond a reasonable doubt, of every element of the offense. The due process violation inflicted here carried with it the toxic side effect of prejudice because the jury instructions, even as acknowledged by the Ninth Circuit, were defective and allowed convictions where, otherwise, there would not have been any.

VI.

THE NINTH CIRCUIT'S RULING IS IN DIRECT CONFLICT WITH THIS COURT'S DECISIONS IN *UNITED STATES V. GAUDIN*, 515 U.S. 506 (1995), *SANDSTROM V. MONTANA*, 442 U.S. 510 (1979) AND *IN RE WINSHIP*, 397 U.S. 358 (1970) AND DEPRIVED PETITIONER DUE PROCESS OF LAW BY ALLOWING CONVICTIONS TO STAND WHERE THE JURY INSTRUCTIONS OMITTED ONE OF THE KEY ESSENTIAL ELEMENTS OF THE OFFENSE – INTENT TO DEFRAUD.

There is no factual dispute here that the guilty verdicts on the bankruptcy counts at issue were reached by the jury only through a "defect in the jury instructions." The Ninth Circuit's Opinion made that an explicit finding. This "defect in the jury instructions" was nothing less than the complete elimination of the central element of the offenses – intent to defraud the bankruptcy trustee. To allow such error of constitutional dimensions to stand is to condone the erosion of the very core of the right to due process and fair trial by jury. This Court must grant certiorari to cure this fundamental error.

The Ninth Circuit's ruling in this case is a naked and facial inconsistency with this Court's precedent and well-known and basic constitutional precepts. Writing for a unanimous court in *United States v. Gaudin*, 515 U.S. 506 (1995), Justice Scalia observed – "The Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged . . . ." *Gaudin* at 510. Having determined that the trial court failed to submit the element of materiality to the jury, Justice Scalia held – "The Constitution gives a

criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt **of every element of the crime** with which he is charged. The trial judge's refusal to allow the jury to pass on the 'materiality' of Gaudin's false statements infringed that right." *Gaudin* at 522-23 (emphasis added).

As in *Gaudin*, an egregious infringement of Petitioner's right has occurred here because the essential element of intent to defraud was omitted from his jury instructions. Indeed, it can be said that the infringement in the case at bar is more egregious because the element omitted from the jury instructions was the equivalent of *mens rea*, and not just one of several technical elements of the offense.

In his concurring opinion, quoting *Sullivan v. Louisiana*, 508 U.S. 275 (1993), Chief Justice Rehnquist added – "[T]he prosecution bears the burden of proving **all elements of the offense charged** and must persuade the factfinder 'beyond a reasonable doubt' of the facts necessary to establish **each of those elements**." *Gaudin* at 523 In the case at bar, the prosecution was inappropriately relieved of this fundamental duty because of "a defect in the jury instructions" and Petitioner was convicted on less than proof "beyond a reasonable doubt" of every element of the bankruptcy fraud offenses charged against him.

More recently, in *Neder v. United States*, 527 U.S. 1 (1999), this Court reaffirmed its ruling in *Gaudin* and held that the harmless error analysis is properly applied to cases where an element of the offense has been omitted in

the jury instructions. Even under a harmless error analysis, Petitioner's convictions must be vacated because, without the defective instructions, there would have been no conviction because the evidence showed that Petitioner never had the intent to defraud the bankruptcy trustee.

However, a harmless error analysis may not be appropriate here because the error in the jury instruction was more fundamental than just omitting an element of the offense. Here, the one element omitted was no less than the intent to defraud which is the central element of *mens rea* for bankruptcy fraud. This case is therefore more analogous to one where the error affects "the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Neder* at 15. Speaking for the majority and discussing this Court's ruling in *Yates v Evatt*, 500 U.S. 391 (1991), Chief Justice Rehnquist noted that "Yates involved constitutionally infirm presumptions on an issue that was the crux of the case – the defendant's intent." *Neder* at 31 (emphasis added). Here, the "defect in the jury instructions" was the omission of the crux of Petitioner's case – intent to defraud. When the jury was not required to consider such central legal concept, the entire framework of the trial itself was compromised.

This Court must grant certiorari to rectify such core constitutional error and threat to the meaning of due process and fair trial.

CONCLUSION

For the foregoing reasons, petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully Submitted,

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Dated: March 16, 2000

APPENDIX

A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ROBERT M. SCHARRINGHAUSEN, Defendant-Appellant.	No. 97-50630 D.C. No. CR-96-00415-MLH
UNITED STATES OF AMERICA, Plaintiff-Appellant, v. ROBERT M. SCHARRINGHAUSEN, Defendant-Appellee.	No. 98-50049 D.C. No. CR-96-00415-1-MLH

MEMORANDUM[1]

(Filed Oct. 7, 1999)

Appeal from the United States District Court
for the Southern District of California
Marilyn L. Huff, District Judge, Presiding

Argued and Submitted, November 6, 1998

Pasadena, California

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Before: KOZINSKI, KLEINFELD, and GRABER, Circuit Judges.

Scharringhausen argues that there was insufficient evidence to support the convictions on counts 8, 9, and 10, and that those convictions are inconsistent with the acquittals on counts 1-7, and 11. In essence, the jury acquitted Scharringhausen of defrauding his partners, but convicted him of hiding certain assets from the bankruptcy court. The sufficiency-of-evidence argument must fail if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[2]

Scharringhausen argues that his case is controlled by *United States v. McCormick*.[3] Under *McCormick*, one element of bankruptcy fraud is that "the statement was knowingly and fraudulently made."[4] There has to be "specific intent to fraudulently conceal assets from the bankruptcy trustee."[5] In *McCormick*, the wife did not participate in preparation of the bankruptcy papers, knew nothing about her husband's financial affairs, and signed the papers without reading them. By contrast, the jury here could conclude from the evidence that Scharringhausen knew how he was conducting his partnerships' affairs and controlled how the papers were

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[2] *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original); *see also United States v. Ross*, 112 F.3d 422, 425 (9th Cir. 1997).

[3] *United States v. McCormick*, 72 F.3d 1404 (9th Cir. 1995).

[4] *Id.* at 1406.

[5] *Id.* at 1410.

prepared so that he could hide his transactions. Perhaps a careful trustee might have found what Scharringhausen failed to disclose, by examining the hundreds of boxes of papers that he produced. That does not, however, establish that no reasonable juror could think that he was trying to hide what he did not disclose on the form. Jurors could think that he did not realize that the contents of the boxes would trip him up, or that he believed that probably no one would do all the work and have all the luck necessary to catch him by poring over the papers in the boxes. Jurors could infer intent to defraud from Strauss's testimony that Scharringhausen told her not to disclose certain accounts and money that he had taken from the firms.

The government appeals the sentence, arguing that (1) the district court should have increased the base offense level by 11, based on an intended loss to the bankruptcy estate of $1,274,000[6]; and (2) the district court should have increased the level by 2 for "violation of any . . . judicial . . . process. . . ."[7]

On the first point, the amount of the intended loss, the district judge made a finding of fact that "there wasn't an intent by Mr. Scharringhausen to hide these transactions from the trustee." The government argues that this finding cannot be squared with the guilty verdict. But it can, because of an (unobjected to) defect in the jury instructions. The instructions did not tell the jury that the statements had to be knowingly and fraudulently

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[6] U.S.S.G. § 2F1.1(b)(1)(L) (1997).

[7] U.S.S.G. § 2F1.1(b)(3)(B) (1997).

made, just that Scharringhausen had to know that the statements were false. So what the jury concluded to have been proved beyond a reasonable doubt did not necessarily include an intent to hide the transactions from the trustee.

It is, as the government argues, hard to see from the cold record why the district judge did not think that Scharringhausen intended to hide the transactions from the trustee. But on this matter of applying the guidelines to the facts of the case, our review is quite deferential. We must give "due regard" to the district court's judgment of witnesses' credibility, we must accept findings of fact unless they are clearly erroneous, and we must "give due deference to the district court's application of the guidelines to the facts."[8] The district judge was there, saw the witnesses, had doubts about the foundation for the testimony of the government's lead witness, Strauss, and was cognizant of the strength of the evidence and the acquittals on the other counts as well as the convictions on these three counts.

On the matter of sentencing, as distinguished from the matter of sufficiency of evidence, the district judge properly considered that Scharringhausen's furnishing of all his backup data to the trustee was evidence that he did not intend to hide the transactions from the trustee. The district court concluded that "there were some questions in his mind as to whether they're true loans," and he was shifting money around to try to save the projects

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[8] 18 U.S.C. § 3742(c); *see also Koon v. United States*, 518 U.S. 81, 97-98 (1996).

in a declining real estate market rather than looting the money to finance an extravagant lifestyle, so the district court did not think that the government had proved "intended loss."

There is a degree of threading the needle here, in treating the evidence of intent to defraud as sufficient for purposes of affirming the conviction, yet as allowing for the district judge's finding that Scharringhausen did not intend to prevent the trustee from getting the money. It gives us pause, but in light of what the jury must have found, the jury instructions, the acquittals, and, most important, our extremely deferential review of sufficiency of the evidence and our deferential review of the application of sentencing guidelines to facts, it can be done. The jury found beyond a reasonable doubt that Scharringhausen signed material false declarations, knowing them to be false. A reasonable juror could have found that his intent was to defraud the trustee. The district judge found at sentencing that Scharringhausen did not intend to defraud the trustee. Evidently, considering the split verdict and the judge's comments at sentencing, the issue was, as she said, "murky." Giving the district judge's decision the deference that the statute and our cases require, we do not have a "firm conviction"[9] that she erred.

The government also argues that the district court was obligated to impose the two-level adjustment for

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[9] *United States v. Reed*, 80 F.3d 1419, 1424 (9th Cir. 1996).

violation of judicial process.[10] We agree. Where the district court has found sufficient evidence to support a conviction for bankruptcy fraud, based on defendants' filing of false bankruptcy petitions, it must apply the § 2F1.1(b)(3)(B) two-level enhancement. This court has interpreted the wording of § 3C1.1 as mandatory and not discretionary.[11] Because the relevant language of § 2F1.1(b)(3)(B) is identical to that of § 3C1.1, it is similarly mandatory: if the defendant committed an offense that involved violation of a judicial process, "increase by two levels."

The jury convicted Scharringhausen of bankruptcy fraud, for filing false bankruptcy petitions, and the court refused to set aside the verdict. Under *United States v. Welch*,[12] filing false bankruptcy petitions is a violation of a specific adjudicatory process for which § 2F1.1(b)(3)(B) provides a two-level enhancement. Therefore, because Scharringhausen was convicted of violating a specific adjudicatory process, the district court erred as a matter of law when it failed to impose the § 2F1.1(b)(3)(B) two-level enhancement. Upon remand, the district court is to impose the two-point upward adjustment mandated by § 2F1.1(b)(3)(B). The district court will of course need to determine the appropriate sentence within the range provided for by the guidelines with that adjustment.

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[10] *See* U.S.S.G. § 2F1.1(b)(3)(B) (1997).

[11] *See United States v. Ancheta*, 38 F.3d 114, 1117-18 (9thCir. 1994) (interpreting U.S.S.G. § 3C1.1 (1997)).

[12] 103 F.3d 906, 908 (9th Cir. 1996).

AFFIRMED in part and REVERSED and REMANDED in part.

APPENDIX

B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ROBERT M. SCHARRINGHAUSEN, Defendant-Appellant.	No. 97-50630 D.C. No. CR-96-00415-MLH
UNITED STATES OF AMERICA, Plaintiff-Appellant, v. ROBERT M. SCHARRINGHAUSEN, Defendant-Appellee.	No. 98-50049 D.C. No. CR-96-00415-1-MLH ORDER (Filed Dec. 22, 1999)

Before: KOZINSKI, KLEINFELD, and GRABER, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing and petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and petition for rehearing en banc is DENIED.